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THE SEPARATION OF POWERS IN OUR GOVERNMENT

BY EDGAR DAWSON

A Defense of the Constitution, contributed by Dr. David Jayne Hill to the March number of the REVIEW, seems to group those who have lost confidence in the efficacy of the separation of powers as a bulwark of liberty with those who advocate the extended use of the initiative, referendum and recall. Dr. Hill's long and distinguished public service, the soundness of his political philosophy, and his convincing argument in defense of the best in our system of government, give to his statements an authority which carries conviction. Unless a word of protest is uttered, this classification will tend to weaken those who would eliminate the theory of the separation of powers from our system and to alienate from their support some who are coming to see that the theory is destructive.

He mentions as the four corner-stones on which our constitutions have been erected: 1, Representative Government; 2, Division of Public Powers; 3, Guarantee of Personal Immunities; and 4, Judicial Protection of Constitutional Guarantees; and he rightly argues that the public press is neglecting its duty to combat the tendency of the day to try political experiments and to neglect experience. His arguments for representative institutions, however, are weakened by the fact that he associates with them the theory of separation of powers, which, while it is one of the corner-stones of our political system, has proved to be a crumbling support,—one that has so weakened the structure that there is danger of collapse. It is impossible to show that representative institutions are in any essential respect dependent upon the separation of powers or bulwarked by acceptance of the

theory. On the contrary, it is not difficult to prove that wherever representative institutions now flourish separation has disappeared, that truly representative institutions and the application of the separation of powers vary in inverse ratio to each other.

If space were available, it could be shown that the separation of powers makes the election of administrative officers necessary and that such organization encourages a long ballot, complicated elections and efforts at direct government; but this paper proposed to do only two things: first, to show that the separation of powers is a baseless and an abstract theory without foundation in experience or successful practice; and second, to describe the system of parliamentary government which the opponents of the separation of powers would advocate as a substitute for this abstract theory.

II

To the mind unacquainted with practical politics the theory that laws must be enacted by one body, interpreted by a second and enforced by a third, each independent of the other, is almost irresistibly attractive. While Aristotle recognized these three functions as distinct from each other, and Locke advocated some separation between the organs performing them, it was Montesquieu who about the middle of the eighteenth century became the father of the theory that liberty is dependent upon this separation. He was a learned French philosopher who lived in an age of abstract reason, one in which men thought, as Arthur Young said, that constitutions can be made according to a general receipt.

Montesquieu in his search for the secret of free institutions went to England and lived there more than a year studying the constitution. He found there a king and a parliament, apparently separated from each other, the former the head of the executive department, and the latter enacting the laws. England under this system was blessed with more personal liberty than was to be found in any other country. He therefore reached the conclusion and wrote it into his book on *The Spirit of the Laws* as a general principle that this separation must be looked upon as the basis of liberty. His doctrine spread like wildfire in France. Our close association with France brought it to America and the more superficial of our publicists accepted it without a mo-

ment's examination in the light of experience. In fact, men had but little experience in self-government at that time. When our State and Federal constitutions were adopted in the last quarter of the eighteenth century the doctrine was written into their very skeletons. It is the backbone of our organization. It is true that Adams and Madison with other of the wiser heads of the day defended the Federal Constitution from those who wished the theory more consistently followed in that document, and said some rather plain things about Montesquieu in doing so; but from that day to this, those who organize government on the basis of intuition rather than of experience cling to the doctrine as the palladium of our liberties.

This superstition persists in spite of the fact that scholars have shown over and over again that Montesquieu was a superficial observer; that his view of the English constitution was, as Mr. Dicey has pointed out, the "lawyer's view" and had but little relation to the actual facts of the day; that he "was ignorant of the tactics of Walpole and could hardly have been behind the scenes in English politics." Walpole was called Prime Minister and the parliamentary system of government was then beginning to sprout, but the title was given in derision by those who disliked his government, just as that of "boss" is given now to various political leaders who are more powerful than we like to see them. Walpole governed the parliament with a system of corruption and coercion which would have delighted the heart of the most unscrupulous of our political bosses. George II told him that he must keep his hands off the army, but that he could do what he wished with his "scoundrels of the House of Commons." There was in England then, as there is in America now, an appearance of a separation of powers; the law provided such separation. In practice, however, there then, as here now, the real power was in the hands of the Invisible Government, maintained by extra-legal if not by dishonest methods. But Montesquieu, a foreigner, did not find this out or at least did not grasp its significance; and so was born the famous theory of the separation of powers. As Mr. Sidney Low has said: "The separation of the Legislative and Executive elements, which is the complete negative of Cabinet Government, was a cherished doctrine long after the two had become indissolubly associated."

Protest against the burden of this false theory in America has grown rapidly in the last half century. Professor Duguit after a most scholarly review of its history in France called it a "*vaine et artificielle théorie*," one completely discredited by several experiments in the home of its birth. Woodrow Wilson more than a generation ago described the baleful effects of it on our Federal system, and the most distinguished critic of his position at that time has since come almost wholly to his point of view. European scholars have never ceased to wonder how practical Americans can continue to live under a system which is based only on abstract reasoning and erroneous observation by a Frenchman in England, when England itself has long outgrown even the superficial pretense of adhering to the arrangement which he described. That modern students of government have ceased to accept the theory requires no proof. Furthermore, practical reformers of the most conservative type are demanding that it be rejected.

The Constitutional Convention of 1915 numbered among its members not a few of the leading statesmen of the day. The floor leader of the majority was Henry L. Stimson, who was working in close co-operation with Elihu Root. Two years before the convention Mr. Stimson at Philadelphia delivered the following remarks, and in the convention advocated policies consistent with them:

I believe that by far the greatest part of the inefficiency and attendant corruption from which we suffer in our Federal and State governments to-day can be directly traced to that venerable heresy which keeps the influence of our executives out of our halls of Congress and assemblies. That it is a heresy has been long and abundantly proven. . . . The theory upon which it is based has been completely abandoned not only in the government of which Montesquieu wrote, but in all other homes of effective parliamentary institutions. It lingers on here in the United States the fount of most of our troubles, yet cherished as if it were a veritable ark of the covenant.

Mr. Root in his now famous address before the convention delivered himself of the following almost radical statements:

From the days of Fenton, and Conkling, and Arthur and Cornell, and Platt, from the days of David B. Hill, down to the present time, the government of the State has presented two different lines of

activity, one of the constitutional and statutory officers of the State, and the other of the party leaders—I don't coin the phrase, I adopt it because it carries its own meaning—the system they call “invisible government.” For I don't know how many years Mr. Conkling was the supreme ruler in this State; the Governor did not count; the Legislature did not count; the comptrollers and Secretaries of State and what not did not count. It was what Mr. Conkling said; and in a great outburst of public rage he was pulled down.

Then Mr. Platt ruled the State; for nigh upon twenty years he ruled it. It was not the Governor; it was not the Legislature; it was not any elected officers; it was Mr. Platt. And the capital was not here: it was at 49 Broadway: Mr. Platt and his lieutenants . . . The ruler of the State during the greater part of the forty years of my acquaintance with the State government has not been any man authorized by the constitution or by the law; . . . The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. . . . It is wrong that a government not authorized by the people should be continued superior to the government that is authorized by the people.

To the student of actual government it is an axiom that the direction and control of co-operative political activity is inevitably single and that undivided leadership will be exercised whether such leadership is recognized in law or not. When the leadership of the English monarch declined, that of the Prime Minister rose in its place, such extra-legal control as that of Walpole marking the transition from the one to the other. The separation of powers now prevalent in our system gives us, instead of a Prime Minister with authority and responsibility, what President Lowell calls “an electioneering agent and a private bill and office broker.” The private party leader stands behind the scenes and actually directs the conduct of public affairs; but not being responsible for the direction of great constructive policies, he devotes his attention to pulling wires for party success and profit. By this I would not imply that the boss is necessarily worse or less able than the Prime Minister would be, but he is freed from the stimulus to constructive leadership which the responsibilities of office would impose upon him under another system. Our policies are directed by Tom, Dick and Harry. We find some of the most important legislation in New York State this year introduced by Mr. Ellenbogen, who may be an excellent person, but who certainly is not regarded by the citizenship of New York State as the leader of public opinion in this State. He is almost unknown

and is not responsible for the legislation which he introduces. We have no responsible leadership. We have instead private bill and office brokers.

III

Instead of this theory, so attractive to the abstract reason and so useless in practical application, we ask for the parliamentary cabinet system. Of the latter Mr. Low in his masterly *Governance of England* says, "If we did not know that the Cabinet System not only existed, but was in practice extremely efficient, we might deem it a fantasy as strange as any conceived in the brain of a philosophical visionary." This system provides that authority shall reside in a representative chamber. This chamber recognizes a group which is called a cabinet, but which is also accurately described as an executive committee. To this cabinet or committee is entrusted the leadership in legislation and the control of administration for so long as the group keeps the chamber's confidence. The chairman of the cabinet is the leader of the majority of the chamber of representatives, the leader of the dominant party, the responsible head of the government. It is representative government reduced to its elements. The limits of this paper do not permit any reference to the relation of a second chamber to this system, but the existence of such an organ need not affect the application of the principle.

The English Government presents the principle in its highest application. The House of Commons is the representative assembly, the Cabinet the executive committee, and the Prime Minister the chairman. So long as he is the representative of the majority in the House of Commons, the Prime Minister is the most powerful ruler upon earth. The instant he loses this capacity as representative of the majority he ceases to have either power or responsibility, for he ceases to be Prime Minister. He may either resign, or, if he believe his position is stronger than that of the House of Commons, he may dissolve the House and ask for the election of another House. This is called an appeal to the country, and may be compared to the use of the referendum in this country; but it avoids the dangers incident to legislation at the polls.

The principle is the most simple one imaginable and

should be considered apart from the long words in which it is frequently discussed. Any body of more than a thousand people, who wish to co-operate in any enterprise, adopt what is essentially this plan of organization. Stock companies elect their boards of directors, corresponding to the House of Commons. The directors appoint an executive committee corresponding to the Cabinet, and provide a chairman or president or manager or Prime Minister. Of course there is less politics in such an organization. That is, there are fewer currents of opinion and less complex problems. But the elementary principle of co-operation and organization is the same. City government is rapidly taking on this form. The advocates of it use the imposing term Commissioner-Manager Plan. Actually, this is a board of directors who appoint a manager to act for them. The city cabinet has not been organized as yet because the cities which have adopted the plan are small and the problems are simple.

The history of the growth of liberal institutions in Western Europe is the story of the adoption of the parliamentary system in that territory. France, after trying the separation of powers three times, and having lived through one revolution after another, finally adopted what is essentially the English system. They elect a president who corresponds to the English king, but neither the king nor the president take any real part in the government. Spain, Italy, the Scandinavian countries, Greece, and the rest, in so far as they can be said to have developed liberalism, have applied the parliamentary system. No one claims that this system or any other political machinery will change the nature of the people who live under it. It can not provide good government when the individual is not capable of governing himself. All that is claimed for it is that it is a method of organizing government in accord with human nature, in order that the government may appear to be what it really is and what it must ever be: i. e., the leadership of a man in public affairs so long as the majority wish him to lead, and the determination whether he shall lead through representatives rather than directly by uninformed direct popular vote.

Russia has passed through her political revolution and there is prospect of Germany entering one. What do the thoughtful liberals expect Russia and Germany to do with autocracy overthrown? The most thoughtful students of government hope that both countries will adopt the prin-

ciple we are describing. The Duma is little more than a board of directors for Russia, composed of representatives of all the different kinds of stockholders in that great corporation. The same will doubtless be true of the Reichstag if liberals have their way. They will only eliminate the separation of powers and make the executive responsible to the representative chamber.

IV

Dr Hill sees a general disposition "to try political experiments"; he says that "the attack upon our existing institutions does not proceed from any coherent conception of the true nature of the State, and it offers no fundamental principle upon which a conception could be erected." "Claiming to be progressive, this scheme of government is in no sense constructive, but totally destructive. It lays down no principle whatever. It offers no guide to indicate to us what it might, if these doctrines were accepted, ultimately become." If he means these remarks to apply only to those who would press for the general adoption of popular government through the initiative, referendum and recall, I am not prepared at this time to argue against his thesis; but if he means among those he describes to include the advocates of parliamentary practice in place of the separation of powers, then I believe he is likely to weaken the cause of representative government by associating with his defense of such government an effort to bolster up a decaying theory that ultimately must go, and in going may carry with it valuable parts of our political structure.

Those who pray for relief from the influence of the theory of separation of powers do not advocate a theory: they join President Butler when he asks, "Why should we not move forward in genuine progress on the line of the last five hundred years?" Our ultra-conservative friends speak of adhering to Anglo-Saxon institutions, but where can anything be found more completely antipodal to Anglo-Saxon institutions as we see them today than is the application of this artificial and abstract theory of the separation of powers? Anglo-Saxon institutions are practical: they proceed by experiment, they have no relation to logic or abstract reasoning; they present themselves today in the English parliamentary system, to which we respectfully direct the attention

of those who say that the opponents of the separation of powers offer no guide to indicate what government under the proposed change would become.

Dr. Hill says of this reform: "Against a division of public powers, it demands predominating executive authority"; but we advocate taking no authority from the legislature. What the executive gains he takes from the private party leader. The executive becomes the party leader, and he uses the force of public opinion to advance political action. Legislative control lies in the votes which enact bills into law, not in the initiation and drafting of bills. This reform would give to the responsible leader of the majority the right to demand that the legislature vote on definite and carefully drawn statements of the legislation which the executive believes public opinion demands.

The sun is rising on our political institutions. Maryland has already been touched by its morning rays. Under the leadership of President Goodnow of Johns Hopkins University that State has amended its Constitution by a provision for the executive budget. The argument against this reform which has been demanded by the best political thought of all parties for several decades, has been that it violates the doctrine of separation of powers and takes from the legislature the right to enact finance bills at its pleasure. The log rolling, mismanagement and extravagance which have resulted from its pleasure is known even to school boys. The Maryland provision requires the Governor and his Cabinet to draft an annual budget, take it to the Legislature, and answer questions about it if members wish additional information. The Legislature is required to vote on the budget as it is presented by the Governor. They may reduce any item or cut out any appropriation; but they may increase none. The principle is that only those who are to administer the government know how much money they need for their task, and that it is for the Legislature to say only whether the state can afford to give them as much as they want or not.

EDGAR DAWSON.